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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1146. 123

JONES & LAUGHLIN STEEL CORPORATION,

Petitioner,

v.

GRIDIRON STEEL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

Reference to the opinions below appears on pages 1 and 2 of the Petition.

JURISDICTION.

The jurisdictional basis is set forth in the Petition.

QUESTION PRESENTED.

Whether a notice of appeal filed by petitioner on the 32nd day after judgment is timely under 28 U. S. C. 2107 when the 30th or last day fell on a Saturday, a day on which the Federal courthouse was open for the transaction of all business by order of the Sixth Circuit Court of Appeals pursuant to Civil Rule 77(c) and a day on which respondent filed its notice of appeal and on which petitioner could have filed its notice.

STATUTE AND RULES OF CIVIL PROCEDURE INVOLVED.

The pertinent portions of 28 U. S. C. 2107 and Civil Rules 73(a) and 77(c) appear in the Petition at pp. 3 and 4. A pertinent portion of Civil Rule 6(a) was omitted by petitioner and Civil Rule 6(b) is also pertinent. They are here set forth:

"Civil Rule 6. TIME

(a) *Computation.* * * * *As used in this rule and in Rule 77(c),* "legal holiday includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, *and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.* (Emphasis ours.)

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; *but it may not extend the time for taking any action under Rules* 50(b), 52(b), 59(b), (d) and (e), 60(b), and *73(a)* and (g), except to the extent and under the conditions stated in them." (Emphasis ours.)

STATEMENT OF THE CASE.

On July 2, 1964, the District Court for the Northern District of Ohio, Eastern Division, entered a final judgment in favor of respondent (plaintiff below) in the amount of $12,289.95. On the 30th day, or on Saturday, August 1, 1964, respondent filed a notice of appeal, appealing only as to the amount of damages allowed and the disallowance of interest thereon, said appeal being docketed in the Court of Appeals for the Sixth Circuit as appeal No. 16,125.

On the same day, August 1, 1964, the clerk of the District Court mailed (as required by Civil Rule 73(b)) copies of respondent's notice of appeal to counsel for petitioner (defendant below), which should have been received by them on Monday, August 3, 1964. On the same day, August 3, 1964, or the 32nd day after the entry of the judgment, petitioner filed a notice of appeal, which was docketed as appeal No. 16,126.

The last day on which either party could file a notice of appeal in this case was the 30th day, or August 1, 1964. Respondent filed its appeal on that day in the Federal Court House at Cleveland, which was open for business, and if petitioner wished to appeal it likewise had to file its notice on or before the last day, or August 1, 1964. The statutes says so, U. S. C. Title 28 § 2107 providing in the first paragraph:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in any action, suit or proceeding of a civil nature before a court of appeals for review *unless notice of appeal is filed, within thirty days after the entry of such judgment, order, or decree.*" (Emphasis ours.)

On December 11, 1964, the Court of Appeals granted respondent's motion for an order dismissing the appeal of

petitioner for the stated reason that "the clerk's office being open on Saturday, the Court finds that the notice of appeal of the defendant-appellant [petitioner] was not filed within the time fixed by law"; and on February 11, 1965, the Court of Appeals denied petitioner's motion for reconsideration (App. pp. 10 and 11 of Petition).

REASONS RELIED ON FOR DENIAL OF THE WRIT.

1. There is no Conflict of Decision.

Both petitioner and respondent are in agreement that there is no conflict among the various circuits which requires resolution by this Court.

2. There is no Question of Public Importance.

Petitioner acknowledges that its counsel have been unable to find a single instance in any circuit where a court has been called on to decide the issue here presented. It is thus readily apparent that the asserted one case out of five alleged by petitioner to raise this issue (Petition, p. 6), as a practical matter, does not raise it.

Even more importantly, the July 16, 1963 order of the Sixth Circuit Court of Appeals (App. pp. 12-13 of Petition) has established pursuant to Civil Rule 77(c) the local rule for the district courts in that circuit as regards the status of the clerk's office on Saturday. The effect of that order on the computation of time for filing an appeal in the Sixth Circuit, if the effect was ever in doubt, has been clearly stated in the lower court's opinion and order in this case (App. p. 10 of Petition). Thus, any case decided in the Sixth Circuit on a Thursday must be appealed by the 30th day, a Saturday, as provided in 28 U. S. C. 2107 unless that day is one on which the clerk's office is closed due to its being a legal holiday. A decision by the United

States Supreme Court is hardly required to establish a local rule for the Sixth Circuit. Moreover, circuits other than the Sixth can have little interest in a case such as is here presented since each circuit, and also each District Court, under Civil Rule 77(c), is given discretion to establish its own local rule with respect to the status of the clerk's office on Saturdays.

In any event, the question here presented will soon disappear when pending amendments of Criminal Rule 56 are adopted by this Court to permit the closing of the clerk's office on Saturdays as to criminal cases. It was this conflict between unamended Criminal Rule 56 and amended Civil Rule 77 as to Saturdays that prompted the Court of Appeals for the Sixth Circuit to promulgate its order of July 16, 1963 (App. pp. 12 and 13 of Petition) keeping the district clerk's office open on Saturday mornings for all business since they were required to be open anyway for criminal matters.

3. The Decision of the Court of Appeals is Clearly Correct.

Respondent filed its Notice of Appeal on the 30th day after judgment, August 1, 1964, which day fell on a Saturday. The District Court in Cleveland was open for the transaction of all business on that Saturday morning as it had been since it originally opened in the 19th Century, unless it was a legal holiday. This practice in the Northern District of Ohio was, or should have been, well known to petitioner's counsel. Nevertheless, petitioner asserts it "relied" on the literal reading of Rule 6(a) (Petition, p. 5). There is nothing in the record which suggests anything of the sort. In fact, the chronology of events clearly indicates that petitioner belatedly filed its appeal after it had discovered that respondent had appealed and only now relies on an interpretation of the civil rules in an attempt to

extend 28 U. S. C. 2107 to permit the filing of a notice of appeal on the 32nd day after judgment. Counsel are obliged to know and are bound by all applicable rules of court including the local rule established by the order of the Sixth Circuit Court of Appeals on July 16, 1963.

Petitioner's position is clearly incorrect. The statute 28 U. S. C. 2107 has never, so far as counsel can determine, been interpreted in a manner whereby the 30th day did not count when that day was a business day and the clerk's office was open; nor has Civil Rule 73(a) ever been so interpreted. Indeed, prior to the 1963 amendment of Rule 6(a), courts counted Saturdays whether the clerk's office was open or not.

Thus, in *Casalduc vs. Diaz*, 117 F. 2d 915, *cert. denied*, 314 U. S. 639 (1941), the First Circuit held that where the last day for filing an appeal fell on a Saturday, and the clerk's office was closed Saturday afternoon pursuant to a court rule, a notice of appeal which was slipped under the clerk's door during the afternoon was not timely because it should have been filed Saturday morning. *Id.* at 916.

In *Muse vs. Freeman*, 197 F. Supp. 67 (E. D. Va. 1961) the court held that where deputy clerks were available to receive papers on Saturday, the time for filing a complaint was not extended to the following Monday despite a court rule which authorized the clerk's office to close on Saturday. In other words the district court held that even though the court was officially closed on Saturday, it made no difference if the court was in fact open for the purpose of filing papers. Furthermore, in the instant case the District Court of Cleveland was open pursuant to the authorization of Civil Rule 77(c) and the specific order of the Court of Appeals.

It follows that an appeal in this case is likewise limited to thirty days by the present statute 28 U. S. C. § 2107 and Civil Rule 73(a). It is mandatory and jurisdictional and is unaffected by Civil Rule 6(a). This is made clear by Civil Rule 6(b) (p. 2 of this Brief) which provides that the time for filing an appeal under Civil Rule 73(a) cannot be extended by any action of the court.

In *Shotkin v. Welsler*, 254 F. 2d 596, 5th Cir., *cert. denied*, 358 U. S. 855 (1958), it was held:

> "When the time for appeal has elapsed, this Court has no jurisdiction of the case and none can be conferred by further action of the District Court. *Waddell v. Chicago Land Clearance Commission*, 7 Cir., 206 F. 2d 748. The appeal must therefore be dismissed." *Id.* at 597.

At page 7 petitioner claims that, "The 1963 amendment added Saturdays to the list of excluded days without any exception or qualification whatsoever * * *." It is true that Civil Rule 6(a) adds Saturdays to the list of excluded days, but not without exception or qualification, which is supplied by Civil Rule 77(c) permitting the adoption of a local rule authorizing district courts to be open for business on Saturdays and on particular legal holidays other than the eight named ones.

The 1963 amendment to Rule 6(a) to add the word "Saturday" obviously was not intended to be effective where the District Court involved was regularly open for the transaction of business on a Saturday. This is demonstrated by the fact that when Rule 6(a) was amended, Rule 77(c) was also amended to provide "* * * but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays." These two rules, Rules 6(a) and 77(c), must be read in *pari materia*. This is apparent from the Advisory

Committee note to Rule 6(a) which states, "This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open." (28 U. S. C. A. Rule 6, Supp. 1965.) This statement precedes the portion of the Advisory Committee on Rules' statement set forth in the Petition at page 7. These two rules also clearly demonstrate that uniformity in all of the district courts as to Saturdays and particular legal holidays, other than the eight named holidays, is not contemplated as impliedly claimed by petitioner.

In other words, Saturdays are treated as *dies non* by amended Civil Rule 6(a) only in the absence of a local rule or order under amended Civil Rule 77(c) that the Clerk's office shall be open for specified hours on Saturdays. Since such a local rule was established by order of the Sixth Circuit Court of Appeals, it follows that Saturdays are not excluded in computing the time for filing an appeal in that Circuit.

We submit that the decisive test as to appeals is—could the notice of appeal be filed within the 30-day period limited by 28 U. S. C. 2107 and Civil Rule 73(a)? If it could, as in the instant case, then it must be, even though the 30th day is a Saturday.

CONCLUSION.

We can perceive of no reason why this Court should grant certiorari in view of the limited scope and interest of this case and the July 16, 1963 order of the Court of Appeals for the Sixth Circuit requiring all District Courts in the Circuit to be open for business on Saturday mornings in accordance with Rule 77(c).

Respectfully submitted,

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